(14)

Supreme Court, U.S.
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No. 99-1815

IN THE
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC. *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS

JONATHAN P. HIATT
JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

THOMAS J. SCHULZ *
632 Comanche Trail
Frankfort, KY 40601
(502) 875-7474

CRAIG BECKER
25 East Washington Street
Chicago, IL 60602

* *Counsel of Record*

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BRIEF FOR THE KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS

STATEMENT OF THE FACTS

1. *The Facility and its Supervisory Hierarchy*

The Kentucky River Community Care, Inc.'s Caney Creek Developmental Center (the facility) is a residential, mental health facility with 80 beds in two wings each with two units.

The facility is headed by an Administrator. Under the Administrator is an Assistant Administrator. The hierarchy then splits into three parts—service, rehabilitation, and nursing. Over the service employees there is a Maintenance and Housekeeping Manager and a Kitchen Supervisor. Over the rehabilitation employees, there are a Clinical Coordinator and two Unit Coordinators. The Unit Coordinators supervise the five Rehabilitation Counselors and 10 Rehabilitation Assistants who work on each unit. JA 8, 45. Over the nursing staff there is a Nursing Coordinator who supervises the six Registered Nurses (RNs) and three Licensed Practical Nurses (LPNs). JA 33-34.

2. *The Nursing Staff*

a. *The Regular Duties of the RNs*

The RNs and LPNs are responsible for the medical care of the residents. Two RNs are typically on duty during each of the facility's three shifts. Each nurse is responsible for one wing of the facility. It is not uncommon for an LPN to be on duty with a single RN, each taking a wing just like the shifts when there are two RNs. JA 47-48.

The RNs personally provide medical care to residents. The NLRB's Regional Director found, "The RNs are responsible for dispensing medication to the residents and for providing any other medical services ordered by a resident's physician or

psychiatrist." PA 50a. Asked to "describe what your job duties are," the one RN who testified stated, "When I come on, it's time for me to start the medications. And so I pass the medications at 1700 and 2100. And it takes over two hours to do the 2100 meds. I do physical assessments. . . . I take care of any complaints [the residents] have, such as stomach ache or maybe a cut or shaving cuts. . . . If it's something I can't handle, I call the doctor." JA 52. The Administrator's testimony confirms the RN's description: "the six RN's and LPN's . . . provide medical service and deal with providing medications, since . . . our residents are on sometimes very complicated medications." JA 8-9. "[T]hey even . . . work with the dietician if there are special diets for some of our people." JA 17. In addition to providing medical care, the RNs provide input into the formulation of treatment plans and run classes for the residents. JA 31-33.

The RN's and Administrator's descriptions of the duties of the RNs were consistent with that of their fellow employees. A Rehabilitation Assistant, asked if he had any relationship with RNs or LPNs, answered, "[I]f we have a resident really acting out I will go to the nurse or the RN's and say, this is what's going on, and we communicate that way. And we—we get together and we'll say well—they'll say, what do you think, and I'll say well—you know, it's kind of like back and forth. And then they usually—uh, either medication or something like that." JA 57-58. If a resident is feeling ill, the Rehabilitation Assistant reports it to nurse. JA 58.

No LPN testified, but, when asked, "Do you have any relationship with the LPN's," the RN who testified responded, "We work together as a team." JA 51. She further testified that her supervisor had told her "RNs and LPNs are the same at Caney Creek." JA 54. For example, when an RN and a LPN are working together on a shift, they decide "by mutual agreement" who will work which side of the facility. JA 48.

The RNs perform their duties largely independently. The Regional Director found, "the RNs including when they are serving as 'building supervisors,' for the most part, work independently and by themselves without any subordinates." PA 52a. No employees report to the RNs and they do not act as the direct supervisor of any classification of employees.

The Unit Coordinators are the direct supervisors of the rehabilitation staff and the Nursing Coordinator is the direct supervisor of the nursing staff. The Unit Coordinator who testified, stated, "I supervise direct care staff, which is the 20 RA's and 10 rehab counselors." JA 45. Asked who his immediate supervisor was, one Rehabilitation Assistant responded, the Unit Coordinator. JA 61. If a Rehabilitation Assistant has a question, he or she asks a Unit Coordinators or Rehabilitation Counselor. JA 14. Rehabilitation Counselors report to a Unit Coordinator. JA 12. The Unit Coordinators evaluate the rehabilitation staff. JA 15. Rehabilitation staff bring their grievances to the Unit Coordinators. JA 34-35.

The Nursing Coordinator, according to the Administrator, has the responsibility of "[s]upervising nursing and all medical services." JA 33-34. Asked what job classifications she supervises, he responded, "The RN's and LPN's." JA 34. LPNs report to the Nursing Coordinator. JA 30. The Nursing Coordinator evaluates the LPNs. Tr. 141. If an RN becomes involved in a disagreement with an LPN, the RN does not have authority to resolve the problem but would call their supervisor—the Nursing Coordinator. JA 54. The Nursing Coordinator, according to the Administrator, is "like a department head." JA 38-39.

There is no dispute about the fact that the RNs performing their regular duties do not have 11 of the 12 supervisory duties set forth in § 2(11) of the National Labor Relations Act which defines the term "supervisor"—to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to effectively recommend such action.

The only possible question arising out of RNs' regular duties is whether the RNs have authority "responsibly to direct" other employees. The RNs play no role in the overall direction of employees' work; that is, the RNs do not assign duties to positions or instruct any other employees concerning their regular or ongoing duties. Rather, in personally caring for patients, the RNs occasionally obtain assistance from a less skilled employee. The Regional Director found that "RNs may occasionally request other employees to perform routine tasks, but they apparently have no authority to take an action if the employee refuses." PA 51a. For example, a Rehabilitation Assistant may assist a resident in assuming an erect position so an RN can dispense medication or assist an RN treating a patient who is acting out. JA 58-60. An RN may request that an LPN give a particular medication to a resident. The RNs' only "responsibilities with respect to the LPN's," according to the Administrator, is to "ensure that they are—that the medications are passed at the right time to the right people." JA 18.

b. *The Duties of the RNs Acting as Building Supervisor*

RNs working on the second and third shifts and on weekends serve as "Building Supervisor." At these times, all conceded supervisors—the Administrator, the Assistant Administrator, the Clinical Coordinator, the Unit Coordinators, and the Nursing Coordinator—have left the facility, but one of them is always on call. JA 39. Although two RNs are typically on duty during these times, neither is in any way designated as *the* Building Supervisor. JA 36-37, 51. The RNs receive no additional compensation for serving as Building Supervisor and there is no position description for "Building Supervisor." JA 37.

The Regional Director found that the "only extra responsibility assumed by the RNs when serving as 'building supervisors' is to obtain needed help if for some reason a shift is not fully staffed." PA 51a. The RNs play no role in the initial assignment of employees to jobs or shifts. JA 18-19. The

Nursing Coordinator "schedules" the RNs and LPNs. JA 29, 34. The Administrator explained that the problem being addressed in designating the RNs as Building Supervisors was "situations . . . where they don't have enough people there, for whatever reason, and especially in bad weather." JA 27.

The judgment that additional employees are needed is routine. The Administrator explained that there was a need to have someone designated "to make the head count and to make the telephone calls." JA 27. In fact, the Administrator testified that the minimum staffing ratios were attached to a memorandum describing the Building Supervisor's duties. JA 30. Building Supervisors do not "decide how many employees are necessary to cover a shift" because "[t]here's a minimum coverage amount that was set," so "anytime it [– the ratio –] drops below the – the minimum coverage, they're authorized to—to get the extra coverage." JA 23, 22. In order to obtain additional staff in any other situation, "they would call the person on call and ask for additional approval." JA 22.[1] This "[d]oes not happen frequently." JA 24.

If additional employees are needed, the Regional Director found, the RNs will first attempt to obtain volunteers from among the employees on the departing shift and then, using a list, contact off-duty employees who live nearby. PA 51a. He found that the RNs have no authority to compel an employee to remain for another shift or to come in when off-duty. *Id.* The Administrator testified that he did not know of any employee ever having been ordered to come in when off-duty. JA 38. He acknowledged that RNs would not have authority to threaten discipline if an employee refused to work an extra shift. JA 38.

There is no evidence in the record of an RN ever performing *any* duty other than insuring minimum staffing while acting as Building Supervisor.

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[1] In fact, the one RN who testified stated that she would call the manager on call before asking anyone to stay late or calling anyone to come in under *any* circumstances. JA 51-53.

The testimony concerning the Building Supervisor assignment was supplemented by three memoranda. JA 62-64. An RN testified that one of the memoranda was placed in the "Memo book" and nurses had to read and sign it. JA 48. It provides that in the event of inclement weather preventing employees from driving to work, "the R/N—Building Supervisor will call local employees first (A list of employees attached with local employees highlighted). . . . R/N—Building Supervisor will have the authority to ask employees to stay over until they have a replacement or there are 5 employees per wing plus a security guard." JA 64.

The RN testified that the second and third memoranda were discussed by the Nursing Coordinator, but she did not remember ever seeing them. JA 48-49.[2] One of these two memoranda states that the Building Supervisor "will be in charge of the facility and all rehabilitation staff." JA 62. The final memorandum provides, "when you come on duty, please check the staffing pattern and visit the units to check the coverage. If necessary, pull from one unit to another. Please write up anyone who does not comply with the request immediately." JA 63. The RN, the only witness who testified in any detail about these memoranda, stated that the Building Supervisor did not check the staffing pattern, didn't visit the units to check coverage,[3] and were not in charge of rehabilitation staff. JA 50.

3. *Findings and Conclusion Below*

The Union petitioned to represent the RNs, LPNs, Rehabilitation Counselors and Assistants, and Recreational Assistants. At the preelection hearing, the Employer contended, among other things, that the RNs are supervisors. Based on the hearing record, the Board's Regional Director concluded that the RNs are not supervisor. The Board denied a petition for

[2] The Nursing Coordinator who testified stated she had not seen *any* of the memoranda. JA 42-43.

[3] She explained that someone from a unit would report being short-staffed. JA 54-55.

review. The employees voted to be represented by the Union but the Employer refused to recognize the Union. The Board found the refusal unlawful, but the Court of Appeals denied enforcement of the Board's order on the grounds that the RNs are supervisors.

a. *The NLRB*

The Regional Director found that the RNs, in their normal capacity and as "building supervisors," "do not have the authority to hire, fire, reward, promote or independently discipline employees or to effectively recommend such action." PA 52a. He further found that RNs, in carrying out their normal duties, "may occasionally request other employees to perform routine tasks." PA 51a. He also found that the RNs "have no authority to take any action if the employee refuses." *Id.* Finally, the Regional Director found that "the only extra responsibility assumed by the RNs when serving as 'building supervisors' is to obtain needed help if for some reason a shift is not fully staffed." *Id.* He found that this task was accomplished first by asking for volunteers among the departing employees and then by using a list of off-duty employees who live nearby. *Id.* He found that the Building Supervisors "do not have authority . . . to compel an employee to stay over or come in to fill a vacancy under threat of discipline." *Id.*

Based on these findings of fact, the Regional Director reached two legal conclusions. First, he concluded that the RNs' direction of less-skilled employees to perform discrete tasks was routine. Second, he concluded that because the "assignment" performed by RNs when serving as Building Supervisor was "pursuant to established policy" and was not mandatory, it did not require the exercise of independent judgment. The Regional Director therefore concluded that the Employer had not carried its burden of proving that the RNs were supervisors. PA 53a.

b. *The Court of Appeals*

The Court of Appeals rejected the decision of the Board by engaging in its own fact finding without any reference to the substantial evidence standard and by reaching its own legal conclusions. The Court's analysis is premised on its express refusal to grant deference to the Board's legal conclusions and its refusal to accept the Board's allocation of the burden of proof on this issue. PA 18a.

Concerning the RNs' regular duties, the Court of Appeals found only that the RNs are responsible for ensuring that the LPNs properly dispense medications. PA 17a. Concerning the RNs' duties when serving as Building Supervisor, the Court of Appeals relied exclusively on selected portions of the two memoranda the RN had never seen. The Court did not even acknowledge the existence of the memorandum in the Memo Book or the testimony on the subject. The Court accepted the following statements in the two memoranda as true: the Building Supervisor is "in charge of the facility and all rehabilitation staff," is "responsible for patient care and must ensure adequate staffing," and is authorized to shift staff between units and must "write up anyone who does not comply with the request immediately." PA 16a. The Court also found that the RNs acting as Building Supervisors can send employees home, but must then call the employees' immediate supervisor. PA 17A.

The Court's legal conclusion is stated in one paragraph:

> The registered nurses at KRCC direct the LPNs in the proper dispensing of medication, regularly serve as the highest ranking employees in the building, seek additional employees in the event of a staffing shortage, move employees between units as needed, and have the authority to write up employees who do not cooperate with staffing assignments. These duties involve independent judgment which is not limited to, or inherent in, the professional training of nurses. [PA 18a-19a.]

SUMMARY OF ARGUMENT

The Board's decision in this case rests on its construction of the term "independent judgment" in the National Labor Relations Act's (the Act's) definition of "supervisor." This Court has concluded that the term "independent judgment" is ambiguous. In construing that ambiguous term, the Board reasonably relied on clear expressions of congressional intent (1) not to exclude as supervisors skilled and experienced employees who work at a trade but who also, in the course of performing their own duties, assign and direct less-skilled employees, (2) to adopt the Board's preexisting definition of supervisor which did not encompass such employees, and (3) to protect professionals even though they both exercise independent judgment in performing their professional duties and often assign and direct junior colleagues and nonprofessional assistants.

In construing the ambiguous term "independent judgment" in light of these expressions of congressional intent, the Board has reasonably (1) set forth certain "guiding principles" for determining when employees' decisions are so constrained that they do not constitute the exercise of independent judgment and (2) required that the independent judgment be exercised in relation to the acts of supervision and not simply in the course of the skilled or professional employees' own work. The Board has relied on this construction since passage of the Taft-Hartley amendments, which introduced the supervisory exclusion, and has applied it across industries to a wide-variety of occupations. Rejection of the Board's reasonable construction of the ambiguous term would drastically contract the coverage of the Act contrary to Congress' intent.

The Board's application of its construction of the term "independent judgment" in this case is supported by substantial evidence. The Board's placement of the burden of proof on the party asserting the exemption is consistent with the treatment of exemptions under similar federal statutes, is a prudent method

of arriving at an accurate result, and is a permissible allocation of the burden of proving an affirmative defense.

ARGUMENT

Section 7 of the Act provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. This case presents the question of whether certain RNs are "employees" as defined in NLRA § 2(3) and, as such, are covered by § 7 or are "individual[s] employed as a supervisor" and, as such, excluded from § 2(3)'s definition of "employees" and outside of § 7's protective grant.

Section 2(3) states that "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise." 29 U.S.C. § 152(3). As this Court has often remarked, "the 'breadth of § 2(3)'s definition is striking.'" *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 91 (1995) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984)).[4] And, to underline the breadth of the term "employee," and to make it plain that both § 2(3) and § 7 extend past manual laborers to highly trained individuals doing work requiring judgment, the Act's § 2(12) defines

> [t]he term 'professional employee' [to] mean[] . . . any employee engaged in work . . . involving the consistent exercise of discretion and judgment in its performance . . . [and] requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in

[4] The corollary of the breadth of §2(3) is that "reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

> an institution of higher learning or a hospital. [29 U.S.C. § 152(12)(a).]

As to "individual[s] employed as a supervisor," who are "not include[d]" in the statutory term "employee," NLRA § 2(11) provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [29 U.S.C. § 152(11).]

Since the supervisory exclusion was introduced into the Act in 1947, in cases arising out of almost every industry and occupation, the Board has recognized that in drafting § 2(11) Congress intended to distinguish between true § 2(11) supervisors who are vested with "genuine management prerogatives" and "certain [§ 2(3)] employees with minor supervisory duties" such as "straw bosses, leadmen, set-up men, and other minor supervisory employees." S.Rep. No. 105, 80th Cong., 1st Sess. 4 (1947), reprinted in *Legislative History of the Labor Management Relations Act, 1947* at 410 (1948) (hereinafter *Leg.Hist.*). The nurse cases are informed by this congressional intent and fit within the Board jurisprudence implementing Congress' intent.

In this case, as in most cases concerning the supervisory status of nurses, there is *no* colorable contention that the "alleged supervisory RNs have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees or to adjust their grievances." *Providence Hospital*, 320 NLRB 717, 725 (1996), *enf'd*, 121 F.3d 548 (9th Cir. 1997). Rather, here, as in most cases, the Employer's central contention is "that the[] disputed RNs

responsibly direct and assign employees and that their exercise of such authority requires the use of independent judgment." *Id.*

To put the foregoing in precise statutory terms, the §2(3)-employee/§2(11)- supervisor status of nurses and other skilled employees turns on the answers to two connected but distinct questions: (1) whether they "hav[e] authority . . . to . . . assign . . . other employees, or responsibly to direct them;" and (2) whether "the exercise of such authority . . . requires the use of independent judgment." 29 U.S.C. § 152(11).

The Board has concluded that the § 2(11) term "assign" "refers to the assignment of an employee's hours or shift, the assignment of an employee to a department or other division, or other overall job responsibilities" or to "calling in an employee or reassigning the employee to a different unit." *Providence*, 320 NLRB at 727. Determining whether such assignment is "routine" or "requir[es] the use of independent judgment" "depends on a careful analysis of the facts of each case." *Id.* In order to draw the distinction between "true supervisors" who exercise "genuine management prerogatives" and employees who perform "minor supervisory functions," the Board has set forth certain "guiding principles." *Id.* The Board has consistently found, and found here, that assignments made (1) on a "rational" or prescribed basis like a decision to "equalize employees' work on a rotational . . . basis," (2) to "meet the vagaries of manpower needs" or, in other words, simply to fill in gaps in regular assignments, or (3) "without authority to require" employees to accept the assignments, do not entail the exercise of "independent judgment." *Id.*

In construing the phrase "responsibly to direct," as used in § 2(11), the Board has "long recognized" that it is crucial to start from an understanding that in many trades and occupations "'there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employer's plants and who incidentally direct the movements and operations of less skilled subordinate

employees,' who nevertheless are not supervisors within the meaning of the Act because their authority is based on their working skills." *Ten Broeck Commons*, 320 NLRB 806, 809-810 (1996) (quoting *Southern Bleachery & Print Works, Inc.*, 115 NLRB 787, 791 (1956), *enf'd*, 257 F.2d 235 (4th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959)). Congress' intent in this regard is most clear in relation to professionals, like nurses, who Congress expressly included as protected employees, while both defining them as employees who perform work "involving the consistent exercise of discretion and judgment" and recognizing that they routinely direct the work of junior professional colleagues as well as a variety of less-skilled assistants. 29 U.S.C. § 152(12).

The Board's careful attention to the relationship between the words in § 2(11) thus respects Congress' intent. A professional or other skilled employee is not a supervisor merely because his or her job involves both the exercise of discretion and the direction of other employees. Rather, the "[i]ndependent judgment must be exercised *in connection with the Section 2(11) function* if the actor is to be deemed a statutory supervisor; use of judgment in related areas of a professional or technical employee's own work does not meet the statute's language." *Providence*, 320 NLRB at 728 (emphasis added). In particular, the Board draws a "distinction between designing important and complex tasks and directing employees in carrying out these tasks." *Ten Broeck*, 320 NLRB at 811. If an employee exercises judgment in the former, i.e., "in designing . . . complex tasks," but not in the latter, i.e., "directing employees in carrying out these tasks," the employee is *not* a supervisor under the Board's construction of § 2(11). By way of clarifying this distinction, the Board gives as an example "designing a patient treatment plan[, which] . . . involve[s] substantial professional judgment, but . . . result[s] in wholly routine direction to the staff that implements that plan." *Providence*, 320 NLRB at 728.

The Board has thus held that "supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, [or] training." *Providence*, 320 NLRB at 729. Indeed, in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994) (*HCR*), this Court recognized that "in applying § 2(11) in other industries, the Board on occasion reaches results reflecting a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives." *Id.* at 583. Examples of the type of direction that do not render an employee a supervisor are "the direction which is given by a lead or journey level employee to another or apprentice employee, the direction which is given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training, and the direction which is given by an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and training." *Providence*, 320 NLRB at 729.

Given the background provided by this Court's decision in *HCR*, which rejected the Board's "unique" "patient care analysis," 511 U.S. at 574, we hasten to emphasize that in deciding this case—and other post-*HCR* cases involving the question of whether nurses are "supervisors"—the NLRB is "apply[ing] the Board's traditional analysis for determining the supervisory status of employees in other occupations." *Providence*, 320 NLRB at 717. The Board's "traditional analysis" predates the Taft-Hartley amendments to the NLRA and was specifically endorsed by the Taft-Hartley Congress in adding the § 2(11) "supervisor" definition to the Act. Given its long tenure and sound footing in the statutory materials, the Board's traditional approach is entirely sound and correct in nurse cases as in the run of non-nurse cases.

I. JUDICIAL DEFERENCE IS DUE TO THE BOARD'S REASONABLE CONSTRUCTION OF AMBIGUOUS TERMS OF THE NLRA.

This Court has made clear that "of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor.'" *Marine Engineers Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S.173, 179, n. 6 (1962). Deference is due the Board both because the Act's definition of supervisors contains ambiguous terms and because the statutory process for administering federal labor policy requires such deference.

Nevertheless, several courts of appeal, including the Sixth Circuit in this case, have *expressly* refused the mandated deference in § 2(11) supervisor cases. *See* PA 17a-18a.[5] *See also Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997); *NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1214 (7th Cir. 1996); *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992). Courts have accused the Board of having a "policy bias" in this area. *See, e.g., NLRB v. St.*

[5] The specific grounds upon which the Sixth Circuit refused deference in the instant case were misguided. The Court below relied on *Mid-America Care Foundation v. NLRB*, 148 F.3d 638 (6th Cir. 1998), but in that case, the Court held that the Board "correctly stated that '[i]ndependent judgment cannot be found where decisions are strictly regulated by specific employer policy.'" *Id.* at 643. The Court found, however, that the LPNs "engage in several supervisory activities that are not 'strictly regulated by specific employer policy.'" *Id.* This lead the Court to hold only that the Board's factual finding that its standard for the exercise of independent judgment was not met was not supported by substantial evidence. In so holding, the Sixth Circuit purported to rely upon *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998). But *Allentown Mack* simply held that the substantial evidence test must be applied to the standard announced by the Board and not to a standard fashioned from the actual holdings of the Board. *Allentown*, thus, provides no support for the Sixth Circuit's refusing to defer to the Board's express construction of the ambiguous terms of the Act in this case.

Mary's Home, Inc., 690 F.2d 1062, 1067 (4th Cir. 1982). But these courts have failed to understand that making policy judgments concerning ambiguous statutory terms is the *duty* of agencies like the Board. As this Court has observed, "resolution of ambiguity in a statutory text is often more a question of policy than of law" and "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

Given these decisions, we begin our elaboration of the legal points outlined in our introduction with a discussion of the roles of the Board and reviewing courts in § 2(3)-employee/§ 2(11)-supervisor cases.

A. Deference is Mandated by this Court's Prior Decisions In *HCR* and *Chevron*.

That deference is due the Board's construction of the terms in the Act's definition of supervisor at issue here is the inescapable conclusion resulting from the decisions in *HCR* and *Chevron*.

In *Chevron*, this Court held that when a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the [enforcement] agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. In *HCR*, this Court held that several of the "phrases in § 2(11) such as 'independent judgment' and 'responsibly to direct' are ambiguous." 511 U.S. at 579. The Board's holding in this case rests on its construction of the ambiguous term "independent judgment." That this term is ambiguous is beyond dispute—every judgment made by an employee is to some extent constrained by employer objectives, policies, and commands and every judgment made by an employee is to some extent independent as no person is an automaton and no set of instructions, no matter how detailed, can cover every possible variation in circumstances. Thus, determining the meaning of

independent judgment requires drawing a line somewhere along the continuum between complete autonomy and total constraint—neither of which ever exist in the workplace.

The ambiguity in the term "independent judgment" brings to the surface the conflicting policies underlying the limited supervisory exclusion—the policy in favor of broad coverage of the Act and the policy in favor of granting employers unfettered authority over their labor relations agents. For as this Court has recognized, the task of construing ambiguous statutory terms is "infused with judgment and discretion, requiring the 'accommodation of conflicting policies that were committed to the agency's care.'" *Department of Treasury, IRS v. FLRA*, 494 U.S. 922, 933 (1990)(quoting *Chevron*, 467 U.S. at 845). Under this Act, "[t]he function of striking that balance . . . is often a difficult and delicate responsibility, which the Congress committed primarily to the . . . Board." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

The combination of the holdings in *HCR* and *Chevron* requires that the courts defer to the Board's construction of the ambiguous phrase "independent judgment" as long as it is reasonable. Indeed, in *HCR*, this Court stated that the Board needs to be given "ample room" to apply these "ambiguous" statutory terms to "different categories of employees." 511 U.S. at 579.

B. Judicial Deference to the Board's Routine and Repeated Sorting of Employees into Exempt and Nonexempt Categories Is Essential to the Administration of Federal Labor Policy

Strict adherence to this requirement of deference in representation cases is critical to the enforcement of the Act for three reasons. First, the question of who is a supervisor is highly fact specific and arises in an almost infinite variety of work places, each with a different hierarchy and with authority distributed differently among employees. This Court has recognized that "the gradations of authority . . . from that of

general manager or other top executive to 'straw boss' are . . . infinite and subtle." *Marine Engineers*, 370 U.S. at 179 n. 6. As the First Circuit has put the point, "Given the myriad iterations of authority that are possible and the subtle distinctions that easily can be drawn, courts must afford great deference to the Board's expert determination of which workers fall into which classification." *Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270, 274 (1st Cir. 1997).

Second, the often difficult question of who is a supervisor arises in every representation case that comes before the Board for the simple reason that all employers employ supervisors and each representation case requires the Board to draw a line between rank-and-file employees eligible to vote and supervisors not eligible to vote. Thus, as this Court recognized in *HCR*, determination of supervisory status "is, of course, part of the Board's routine . . . adjudicative function." 511 U.S. at 582.

Finally, broad, non-deferential judicial review of Board decisions concerning supervisory status, of the sort *expressly* applied in this case, impedes the representation process as the Courts of Appeal are asked to follow the Sixth Circuit's lead and find facts and review conclusions concerning individual supervisors. There is a statutory policy in favor of the expeditious resolution of disputes concerning employee representation. After all, the peaceful resolution of disputes concerning representation through the conduct of elections was the central purpose of the Act. *See Fibreboard Corp. v. NLRB*, 379 U.S. 203, 211 (1964) ("The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife.") When employers seek review of the results of elections in the Courts of Appeal by refusing to bargain with the employees' chosen union and forcing the Board to seek compliance in the Courts, however, the resolution of the dispute concerning representation is delayed for many months and often years. When routine administrative decisions concerning supervisory status are

regularly subject to the protracted process of review because of the refusal of deference, the statutory status of the NLRB is degraded and it is prevented from fulfilling its statutory duty to expeditiously resolve disputes concerning employee representation.

C. This Court's Decision in *HCR* Provides No Grounds for Refusing Deference.

In *HCR*, this Court did not decide whether nurses in general or even the nurses at issue in that case fit within the statutory definition of supervisors. This Court made clear that "[i]n cases involving nurses," the Board could "conclude that supervisory status has not been demonstrated." 511 U.S. at 583. What is more, the *HCR* Court did not even reach the statutory questions at issue here. Rather, this Court rejected the Board's construction of one term in the statutory definition—"in the interest of only the employer." *Id.* at 574. Indeed, this Court reiterated, "our decision casts no doubt on Board or court decisions interpreting parts of §2(11) other than the specific phrase 'in the interest of the employer.'" *Id.* at 583. Thus this Court did not indicate what a "proper test" for determining if nurses are supervisors would be or apply that test to the facts in *HCR*. *Id.* at 584.

The fact that this Court so corrected the course of the Board's nurse jurisprudence in *HCR* does not in any way "impair the validity" or detract from the deference owed the Board's subsequent construction of the Act. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265 (1975). After the decision in *HCR*, the Board requested that the parties and any interested amici address the impact of *HCR* and "the proper interpretation of 'assign,' 'responsibly to direct,' 'routine,' and 'independent judgment.'" in two cases. *See Providence*, 320 NLRB at 717, 727. One case arose in an acute-care hospital and the other in a nursing home. *See Providence*, 320 NLRB at 717; *Ten Broeck*, 320 NLRB at 806. Amicus briefs were filed by the Chamber of Commerce of the United States, the American Hospital

Association, the American Health Care Association, the AFL-CIO, the American Nurses Association, and many other interested parties and the Board heard oral argument. *Providence*, 320 NLRB at 717 n. 1. The decisions in these two cases reiterated the Board's long-standing construction of the term "independent judgment" and applied the construction to nurses.

As we stressed at the outset, the decisions in *Providence* and *Ten Broeck* do not represent a novel construction of the Act. Moreover, the Board did not abandon this construction during the relatively brief period it relied on the phrase "in the interest of the employer" to decide nurse supervisor questions, but rather simply did not reach the issue in most cases. Thus, nothing in *HCR* comes close to providing a ground for declining the Board's *Providence/Ten Broeck* analysis the normal deference due a reasonable agency construction of the ambiguous terms of its organic act.

II. THE BOARD'S CONSTRUCTION OF THE AMBIGUOUS TERM "INDEPENDENT JUDGEMENT" IS A RATIONAL AND PERMISSIBLE CONSTRUCTION OF THE ACT.

In this case, the Board concluded that the RNs did not exercise "independent judgment" either (1) in occasionally directing other employees to perform discrete tasks or (2) in determining that an existing staff-to-resident ratio was not met and requesting volunteers to work an extra shift. The construction of the ambiguous term "independent judgment" the Board applied to reach both these conclusions is rational and consistent with the language of the Act, its legislative history and the Board's longstanding case law outside of the healthcare industry.

A. Congress Did Not Intend to Exclude As Supervisors Employees Who Engage in Limited Assignment and Direction Based on Superior Skill or Experience.

Congress' careful choice of the words of § 2(11) of the Act was informed by its understanding that there are § 2(3) employees who exercise some authority over others but who are not § 2(11) supervisors. Congress expressed its intent to distinguish excluded § 2(11) supervisors from such included § 2(3) employees through the language of § 2(11) in two principal ways. First, Congress carefully chose the list of duties enumerated in § 2(11). Second, Congress provided that the exercise of the enumerated duties must require the "use of independent judgment" and not be "merely routine or clerical in nature."

The ambiguous term "independent judgment" is an appropriate vehicle through which to insure that Congress' intent that employees with only minor authority over others not be excluded from the Act's protections. As the Seventh Circuit recognized, "The concept of 'independent judgment' under § 2(11) is, at its core, concerned with those who work at the margins of supervisory authority." *NLRB v. Grancare, Inc.*, 170 F.3d 662, 667 (7th Cir. 1999). Congress intended the application of the independent judgment criteria to separate supervisors from "employees who exercise some authority but not enough to be considered more than part of the regular work force." *Id.* at 667-68.

In construing the term "independent judgment" to distinguish true supervisors from employees with minor authority over others, the Board has been true to Congress' intent. This intent is manifest in the legislative history in three respects: (1) in the explanation of the narrower Senate language and why it was adopted, (2) in the expressions of intent to exclude only foremen and those of like or higher rank, and (3) in the expressions of intent to adopt a definition of supervisor consistent with preexisting Board jurisprudence.

1. In *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267 (1974), this Court traced the origins of § 2(11) and explained its purpose and scope. As this Court explained, the original Wagner Act contained no exclusion of supervisors. Nonetheless, the NLRB from the first distinguished between "supervisory employees" and other "employees." At times the Board did so to exclude the former from the Act's coverage. But even when treating supervisory employees as covered, the Board distinguished them from other employees for purposes of defining appropriate bargaining units. The status of supervisory employees came to the fore during World War II when foremen in the war industries organized in significant numbers, the NLRB held their organization in separate units was protected by the Act, and this Court sustained the Board's conclusion in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947). "The *Packard* decision was a major factor in bringing about the Taft-Hartley Act" in 1947. *Bell Aerospace*, 416 U.S. at 279.

Both the House and Senate bills that passed in 1947 contained provisions excluding supervisors from the definition of protected employees. *See id.* at 279-81. The Senate bill "defined that category more narrowly" and it was the Senate's narrower language that was adopted. *Id.* at 280, 282.

Discussion of the Senate bill's language makes clear that it was drafted and adopted to insure a narrow supervisory exclusion. The Senate Committee Report on the bill states:

> the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. [*Leg.Hist.* 410.]

The Committee indicated that it took "great care" that employees excluded from the coverage of the Act "be truly supervisory." *Leg.Hist.* 425.[6]

The narrower definition of supervisor contained in the Senate bill was adopted by the Conference Committee.

2. It is clear from the historical context and the discussion in Congress that the unionization of foremen was the immediate problem Congress intended to address in the amendment and that Congress understood the term supervisor to mean foremen and those of higher rank. It is also clear that Congress understood the term foremen to encompass employees who performed no manual work but rather supervised a department or like unit.

The House Conference Report explained that the adopted conference language "confined the definition of 'supervisor' to individuals generally regarded as foremen and persons of like or higher rank." *Leg.Hist.* 539.[7] In a similar statement to the Senate after the conference, Senator Taft explained, "The Senate amendment, which the conference ultimately adopted, is limited to bona fide supervisors. . . . The Senate Amendment confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank." *Leg.Hist.* 1537.

Throughout the legislative history are statements that make it clear that it was "unions of foremen" that Congress intended to put outside the Act's protection. *Leg.Hist.* 299. *See also*

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[6] Criticism of the broader House language in that chamber mirrored the concerns of the Senate. The House Minority Report criticizes the broad definition in the rejected House bill as "sufficiently broad to cover a carpenter with a helper." *Leg.Hist.* 362. This same criticism was made on the floor. *See Leg.Hist.* 836.

[7] In fact, the broader House bill had been attacked on the floor on the grounds that it "not only excludes foremen and higher supervisory employees [but others as well]." *Leg.Hist.* 652.

Leg.Hist. 306-07, 410-11, 603, 1480, 1496, 1576. Senator Taft himself explained to the Senate that his "bill provides that foremen shall not be considered employees." *Leg.Hist.* 1008. *See also Leg.Hist.* 1519. Congressman Pepper stated the general understanding explicitly, "what [the bill] does, in substance, is to deny to supervisory personnel, whom we usually think of as foremen, the right of collective bargaining." *Leg.Hist.* 1167. In fact, congressmen often used the terms supervisors and foremen interchangeably. *See Leg.Hist.* 869, 993, 1606.

These clear statements that the exclusion of supervisors was intended to encompass only "foremen" and "persons of like or higher rank" are significant because the term "foremen" had a well-understood meaning in 1947. In fact, in the very case that Congress sought to overturn through adoption of §2(11), *Packard Motor Car Co.*, 61 NLRB 4 (1945), the Board had observed, "the status and duties of all classes of foremen at Packard is the same as that of foremen in other mass production industry. . . . At Packard each foreman is responsible for the quality and quantity of production of the workers under his supervision. None of the . . . foremen perform[] any manual work." *Id.* at 23.[8] The foremen "are in charge of one or more departments." *Id.* at 22. Thus, members of Congress understood the exclusion of supervisors to apply to foremen or department heads who did not themselves work at the trade but rather supervised all employees in a department and to persons of "like or higher rank."

3. The express adoption of the pre-existing Board jurisprudence also reveals Congress' intent not to exempt

[8] In fact, the main "contrast" between foremen and the "straw bosses, leadmen, [and] set-up men" who Congress did not intend to define as supervisors was that the latter "spent most of their time in actual production." N. Lichtenstein, "The Man in the Middle: A Social History of Automobile Industry Foremen," in N. Lichtenstein & S. Meyer, *On the Line: Essays in the History of Auto Work* 153, 157 (1989).

skilled employees who work at a trade and, as a result of training or experience, instruct or guide less-skilled employees.

"Even before the adoption of § 2(11) in 1947, the Board excluded supervisors from units of rank-and-file employees. In so doing, the Board classified "skilled and experienced employee[s] whose duties include instructing other employees and inspecting their work, but who work[] at production" as rank-and-file employees and *not* as supervisors. *North Star Specialty Co.*, 5 NLRB 763, 765 (1938). The Board followed this approach consistently from the period immediately after passage of the Act up to the adoption of the Taft-Hartley amendments even where the skilled employee functioned as the leader of a team, crew, gang or other work unit and even when during certain shifts (typically the evening or night shift) the skilled employee was the highest ranking employee on duty. *See, e.g., Endicott Johnson Corp.*, 67 NLRB 1342, 1347 (1946) (employees who "direct from one to six employees" and whose "duties are to keep production moving on schedule and to inspect and control the quality of work" not supervisors); *Federal Shipbuilding and Drydock Co.*, 55 NLRB 1438, 1439 (1944) (chargemen who assign work to and "direct and guide the work" of draftsmen not supervisors); *The Arundel Corp.*, 53 NLRB 466, 470-71 (1943) ("journeyman" who, during certain hours, was "in charge of the . . . yard" and who directs other employees, but also does manual work not supervisor); *U.S. Rubber Co.*, 30 NLRB 1074, 1077-78 (1941) (night shift "supervisors" who direct work of "skeleton crew," but spend 50 to 100% of their time on ordinary manual labor not supervisors); *Lidz Brothers*, 5 NLRB 757, 760 (1938) ("nominal heads of . . . departments" who, "to a limited extent supervise the work of the other employees," but who "also spend a considerable amount of time doing such work as is done by the other employees" not supervisors).

This pre-1947 case law is highly relevant because in *excluding* supervisors from the protection of the Act in 1947, Congress first endorsed the definition the Board had used to

place true supervisors in separate units from rank-and-file employees, and then rejected the Board's conclusion that supervisors, so defined, were covered by the Act and had the right to organize in separate supervisor bargaining units. The Senate Report expressly states, "the committee has adopted the test which the Board itself has made in numerous cases when it has permitted certain categories of supervisory employees to be included in the same bargaining unit with the rank and file." *Leg.Hist.* 410. The Report then cites with approval several prior Board cases, including one that the Report's own parenthetical describes as involving "group leaders with authority to give instructions and to lay out the work." *Id.*[9] Senator Ellender[10] made similar comments in explaining the bill to the Senate. "[T]he definition adopted by our committee is the one that has been put into practice for several years last past by the NLRB." *Leg.Hist.* 1065. *See also Leg.Hist.* 1068. As explained above, the definition in the Senate bill, modeled on the existing Board jurisprudence, was adopted in conference and enacted into law.[11]

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[9] The cited cases were *Endicott Johnson Corp.*, 67 NLRB 1342, 1347 (1946) (summarized above); *Bethlehem-Sparrows Point Shipyard, Inc.*, 65 NLRB 284, 286-87 (1946) ("Timekeeper Leaders A" who each "direct[] the work of from 6 to 20 timekeepers and timekeeper leaders B" not supervisors); *The Richards Chemical Works, Inc.*, 65 NLRB 14, 16 (1945)("so-called foremen and assistant foremen" who "spend part of their time supervising and the balance in assisting in getting out the work" not supervisors); *Pittsburgh Equitable Meter Co.*, 61 NLRB 880, 882 (1945)("so-called supervisors" who "instruct and assign material to men who work under them in groups from 1 to 40" not supervisors).

[10] The explanatory comments of Senator Ellender are particularly noteworthy as he introduced an amendment to the definition of the term supervisor in the bill that passed in the prior session, but was vetoed by President Truman, upon which the language in the Taft-Hartley Act was based. *See Leg. Hist.* at 425 (language "patterned after that contained in the Ellender Amendment").

[11] Shortly before the Senate bill was passed, the phrase "responsibly to direct" was added to the definition of supervisor by an amendment offered by Senator Flanders. The Senator explained his amendment's purpose as follows:

> the definition of "supervisor" in this act seems to me to cover adequately everything except the basic act of supervising. Many of the activities described in paragraph (11) are transferred in modern practice to a personnel manager or department. . . .
>
> [A supervisor may be] charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance. . . .
>
> Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees," as enumerated in the [Senate Committee] report. Their essential managerial duties are best defined by the words "direct responsibly," which I am suggesting. [*Leg.Hist.* 1303.]

In other words, Senator Flanders was concerned that the definition actually might not include foremen if all personnel functions other than the full-time direction of a group of employees in a department were centralized in a personnel department. His proposal was immediately accepted by Senator Taft, who stated that it "merely adds to the definition of the word 'supervisor.' The definition in the bill is that which has been used by the National Labor Relations Board for the past 4 or 5 years; but I have no objection certainly to including the words 'or responsibility [sic] to direct them.'" *Leg.Hist.* 1304. The amendment passed by voice vote without further debate. *Id.* The amendment was thus intended to make clear that, consistent with the preexisting jurisprudence, employees like foremen and department heads, who direct the work of an entire department, but have none of the other duties enumerated in the original Senate language, are still supervisors.

Within months after the Taft-Hartley Act was enacted, the NLRB found itself called upon to interpret and apply the supervisory exclusion. The Board's initial decisions shed additional light on the contemporaneous understanding of § 2(11)'s import. Not surprisingly, in view of Congress' stated intent, the Board concluded that "[t]he definition of supervisors contained in section 2(11) of the act as amended is substantially a codification of the definition formulated and uniformly applied by the Board for several years before the amendment of

the statute." National Labor Relations Board, *Thirteenth Annual Report* 38 (1948). The Board thus continued to treat as employees, rather than supervisors, workers who exercised "minor" supervisory authority, such as "leadmen" who "work side by side with the other production employees" but whose "duties involve the direction or guidance of other employees in the course of production operations." *George Ehlenberger and Co., Inc.*, 77 NLRB 701, 703 (1948). *See also H.J. Heinz Co.*, 77 NLRB 1103, 1105-06 (1948); *The Austin Co.*, 77 NLRB 938, 943 (1948); *Sterling Pulp & Paper Co.*, 77 NLRB 63, 68 (1948); *Electric Auto-Lite Co.*, 76 NLRB 1189, 1193-94 (1948); *The S-P Mfg. Co.*, 75 NLRB 701, 704 (1947).

These clear expressions of Congress' intent not to exclude employees working at their trade or occupation who have limited authority to assign or direct based on their skill or experience have guided the Board's construction of the term independent judgment in two respects: (1) in the articulation of the principles used to distinguish between independent and routine judgment—because even leadmen and like workers who Congress clearly did *not* intend to classify as supervisors exercise some independence in assigning work and directing others; and (2) in requiring that the independent judgment be exercised in relation to the assignment and direction—because the skilled and experienced employees Congress did *not* intend to exclude exercise independent judgment in performing their own work and many incidentally assign and direct other employees.

B. Congress Did Not Intend to Exclude Professionals, in Particular Nurses, as Supervisors Based on Directions Given to Less Skilled Employees Serving as Their Assistants

This Court has made clear that "in expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989). In

particular, courts and agencies must "fit, if possible, all parts into an harmonious whole." *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959). Thus the question of whether nurses are excluded from the protection of the Act as supervisors cannot be answered without considering the express inclusion of nurses as professional employees entitled to the Act's protection.

Congress defined professionals in the Taft-Hartley amendments of 1947 in order to grant them unique powers of self-determination. *See* 29 U.S.C. §§ 152(12), 159(b)(1). And, Congress clearly intended nurses to be classified as professionals. The Senate Committee Report explains that it was "careful in framing a definition to cover only strictly professional groups such as . . . nurses." *Leg.Hist.* 425. *See also id.* at 417.

The definitions of professional and supervisory employees are adjacent sections of the Act, both inserted by the same 1947 amendments. Section 2(12) defines a subset of § 2(3) employees. Section 2(11) operates as a proviso to § 2(3) that excludes a group of individuals from § 2(3). That much alone leads to the conclusion that Congress could not have intended for the § 2(11) exclusion from the category of employee to empty the § 2(12) subset of the category of employee of all or nearly all its contents.

"Yet, the two definitions contain parallel terms—both require that the employees exercise "judgment." *Compare* 29 U.S.C. § 152(11) (supervisor must have authority that "requires use of independent judgment") *with* 29 U.S.C. § 152(12) (professional must engage in work "involving the consistent exercise of discretion and judgment"). Moreover, Congress clearly understood that professional employees ordinarily direct the work of less skilled colleagues and assistants. In expressly providing for the coverage of professional employees, Congress also expressly recognized that they often direct more junior colleagues. Section 2(12) of the Act defines professionals to include both those who are independently performing

professional work and those who have completed their instruction and are "performing related work under the supervision of a professional person." As the Conference Report on the 1947 amendments makes clear, "This definition in general covers such persons as . . . medical personnel together with their junior professional assistants." *Leg.Hist.* 540. Indeed, virtually all professional employees make use of lesser trained employees to accomplish their professional duties. As Judge Posner observed in endorsing a "distinction between supervision in the statutory sense and work direction by a professional," "most professionals have some supervisory responsibilities in the sense of directing another's work—the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide, and so on." *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983).

The 1947 Congress that both adopted the supervisory exclusion and the professional employee inclusion thus expressed its awareness of the fact that professionals ordinarily direct less skilled colleagues and assistants and defined professionals to include only those who exercise judgment. That Congress could not have intended to take away with one hand what it granted with the other. This is not to suggest that a professional cannot be a supervisor, but it is to suggest, as Judge Phillips stated in dissent in *Beverly Enterprises, Virginia, Inc. v. NLRB*, 165 F.3d 290 (4th Cir. 1999), that "Congress's express direction that professional employees remain under the Act's organizational protections notwithstanding their 'consistent exercise of discretion and judgment in [performing their work]' be also taken into account." *Id.* at 303.

This Court recognized that the express inclusion of professionals must guide the construction of the exclusions from the definition of employee in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). "We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress'

expressed intent to protect them." *Id.* at 690. In fact, this Court cited with approval Board holdings in which "architects and engineers functioning as project captains for work performed by teams of professionals are deemed employees despite substantial planning responsibility and authority to direct and evaluate team members." *Id.* at 690 n. 30. In the cited cases, the Board found these professionals were not supervisors.[12] This Court stated, "We think these decisions accurately capture the intent of Congress." *Id.* at 690.

The Board has reconciled the inclusion of professionals and the exclusion of supervisors by careful attention to the statutory language which requires not simply that a supervisor exercise independent judgment but that the exercise of such judgment be essential to the performance of the enumerated supervisory duties. In *HCR*, this Court clearly indicated that only "an employee who in the course of employment uses independent judgment *to engage in 1 of the 12 listed activities* . . . is a supervisor." *Id.* at 579 (emphasis added). Thus, the fact that an employee uses independent judgment and directs other employees is not sufficient to make him or her a supervisor. The employee must use independent judgment in the direction of the other employee.

"In its first post-*HCR* decisions, then, the Board properly required evidence of the use of independent judgment in the performance of the § 2(11) duties and not simply in the carrying out of the professional's tasks. In *Providence*, the Board explained:

> [W]hen a professional gives directions to other employees, those directions do not make the professional a supervisor merely because the professional used judgment in deciding what instructions to give. For example, designing a patient treatment plan may involve substantial professional judgment, but may result in wholly routine direction to the

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[12] *See General Dynamics Corp.*, 213 NLRB 851, 857-58 (1974); *Wurster, Bernardi & Emmons, Inc.*, 192 NLRB 1049, 1051 (1971); *Skidmore, Owings & Merrill*, 192 NLRB 920, 921 (1971).

staff that implements that plan. Independent judgment must be exercised in connection with the § 2(11) function if the actor is to be deemed a statutory supervisor; use of judgment in related areas of a professional or technical employee's own work does not meet the statute's language. . . .

> Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position, such as the direction which is given by a lead or journey level employee to another or apprentice employee, the direction which is given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training, and the direction which is given by an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and training. [*Id.* at 728-29.]

See also Ten Broeck, 320 NLRB at 811.[13]

A clear example of this distinction is presented by the facts of this case. The RNs may exercise independent, professional judgment in deciding what medication to dispense to a resident, but the RNs do not exercise independent judgment in asking the one LPN on duty to deliver the medication.

C. The Nurse Cases Fit Within the Board's Longstanding, Broadly Applied Supervisor Jurisprudence.

In deciding post-*HCR* nurse cases the Board has followed its own long-standing § 2(11) jurisprudence as applied across a

[13] The Board has long been attentive to whether the independent judgment is exercised in relation to the § 2(11) functions in non-nurse cases as well. *See, e.g., Central Cartage, Inc.*, 236 NLRB 1232, 1247 (1978) (dispatcher uses "skill, specialized knowledge, and seasoned judgment . . . concern[ing] equipment availability" but does not act with "discretion in directing employees"); *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331, 334 (1st Cir. 1948).

wide variety of occupations. In its first post-*HCR* cases, the Board made clear that it would treat nurses "the same as all other employee classifications and . . . apply to them the same test as [it] appl[ies] to all other employees." *Ten Broeck*, 320 NLRB at 810. In *Ten Broeck*, the Board observed:

> "[T]he LPNs' supervision of CNAs is narrowly circumscribed to giving rather general, routine directions to lesser skilled employees in order to maintain the quality of their work. This type of authority is typical of that of the industrial strawboss and leadman, skilled employees with only limited authority, who are routinely excluded from the definition of supervisor. [320 NLRB at 811-12.]

The Board concluded, "we believe the definition of leadperson in *Southern Bleachery* aptly describes the LPNs as they are 'highly skilled employees whose primary function is physical participation in the . . . operat[ion] . . . of their employer's [business] and who incidentally direct . . . less skilled subordinate employees.'" *Id.* at 812 n. 11.

Southern Bleachery, cited by the Board in *Ten Broeck*, represents one of the Board's most extended descriptions of the jurisprudence at issue:

> Throughout the industry of this Nation, there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employers' plants and who incidentally direct the movements and operations of less skilled subordinate employees. These artisans have a close community of interest with their less experienced coworkers and the amended Act has preserved for them the right to be represented by a collective-bargaining agent in dealings with their employers. [citing Senate Report, *Leg.Hist.* 410]. The Board has, therefore, consistently included in bargaining units such employees, often craftsmen or persons in comparable positions, whose authority is based upon their working skill and experience. . . .

> For the Board to hold . . . that every craftsman, who has 1 or 2 helpers . . . is a supervisor and hence is to be denied the benefits of the Act, would be to eliminate a substantial part of the craftsmen in the Nation from the coverage of the Act and fly in the face of the demonstrated concern of Congress for craft units. [115 NLRB at 791-92.]

The Board has reached this conclusion in decisions dating from immediately after the adoption of the Taft-Hartley amendments to the present, arising out of almost every occupational category. In all these cases, the Board has held that leadmen, skilled employees, journeymen, and professionals who primarily work at their trade, but who also have limited authority to assign work and direct other employees, are not supervisors. *See, e.g., The Door*, 297 NLRB 601, 602 n.7 (1990)(doctor and lab technicians); *Aquatech, Inc.*, 297 NLRB 711, 716-17 (1990), *enf'd*, 926 F.2d 538 (6th Cir. 1991) (leadmen); *Marymount College of Virginia*, 280 NLRB 486, 489 (1986)(professional librarians and library technicians); *Golden-West Broadcasters-KTLA*, 215 NLRB 760, 762 n. 4 (1974)(directors); *General Dynamics Corp.*, 213 NLRB 851, 858-59 (1974)(professional engineers); *Frederick Confer & Assocs.*, 193 NLRB 910, 910 (1971)(architect "project captains" and "specification writers"); *Skidmore, Owings*, 192 NLRB at 921 (1971)(architect project managers and job captains); *Wurster, Bernardi*, 192 NLRB at 1051 (same); *Fordham University*, 193 NLRB 134, 138 (1971)(professor and secretary); *Plastics Industrial Products, Inc.*, 139 NLRB 1066, 1067-68 (1962)(leadmen); *Pennsylvania Power & Light Co.*, 122 NLRB 293, 295-96 (1958)(senior project engineer); *Worden-Allen Co.*, 99 NLRB 410, 414 (1952)(draftsmen "squad leaders"); *Sonotone Corp.*, 90 NLRB 1236, 1239 (1950)(engineers and associate and assistant engineers); *Rub-R Engraving Co.*, 89 NLRB 475, 476 (1950)(journeymen and apprentices); *Union Elec. Power Co.*, 83 NLRB 872, 879 n. 14 (1949)(accountants); *Cities Serv. Oil Co.*, 75 NLRB 468, 469-70 (1947)(chemists and lab assistants and junior chemists).

"By a parity of reasoning, after the Board in 1967 concluded that for-profit hospitals and nursing homes "substantially affect commerce" and hence were within the NLRB's jurisdiction, *see Butte Medical Properties*, 168 NLRB 266 (1967); *University Nursing Home, Inc.*, 168 NLRB 263, 264 (1967), the Board repeatedly found that the typical hospital and nursing-home RNs and LPNs were not clothed with sufficient authority to make them supervisors based on its existing jurisprudence. For example, in *Abingdon Nursing Center*, 189 NLRB 842, 850 (1971), the Board reasoned that the duties of an LPN Charge Nurse were "similar to those of a leadwoman" and not supervisory. *See also Mountain Manor Nursing Home*, 204 NLRB 425, 426 (1973); *Leisure Hills Health Centers, Inc.*, 203 NLRB 326, 326 (1973); *Madeira Nursing Center*, 203 NLRB 323, 324 (1973); *Garden of Eden Nursing Home, Inc.*, 199 NLRB 16, 23-24 (1972); *Jackson Manor Nursing Home*, 194 NLRB 892, 896 (1972); *Diversified Health Services, Inc.*, 180 NLRB 461, 461-62 (1969); *New Fern Restorium Co.*, 175 NLRB 871, 871 (1969).

To be sure, the Board's analysis in nurse cases became separated from its broader jurisprudence after the passage of amendments to the Act in 1974 that extended coverage to non-profit hospitals. This can be traced to passages in both the House and Senate Committee reports on the amendments commenting favorably on the fact that "existing Board decisions . . . . carefully avoided applying the definition of 'supervisor' to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients and thus is not the exercise of supervisory authority in the interest of the employer." S.Rep. No. 93-766, 93rd Cong., 2d Sess. 6 (1974); H.R.Rep. No. 93-1051, 93rd Cong., 2d Sess. 7 (1974).[14] While the Committees, in fact, did not accurately

[14] In fact, this Court commented in dicta in *Yeshiva* that "Congress expressly approved this approach in 1974." 444 U.S. at 690 n. 30.

summarize the existing case law, but rather took one phrase in a few cases as a categorical holding, the Board proceeded to adopt the dichotomy between acting in the interest of the patient and acting in the interest of the employer.[15] This was the origin of the "patient care analysis" rejected by this Court in *HCR*—the analysis the Board has accordingly abandoned in its post-*HCR* nurse cases in favor of its long-standing, generally applicable "independent judgment" analysis.[16]

The relationship between RNs and LPNs and between LPNs and nurses aides typifies the relationship between other professionals and their assistants, between craftspersons and helpers, and between skilled and less skilled employees. The

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[15] In fact, even after the passage of the health care amendments, the Board in some cases continued to analyze nurse supervisor questions using the same principles it had always used. *See, e.g., Beverly Manor Convalescent Centers*, 275 NLRB 943, 947 (1985)(LPNs' direction of aides "is that of the industrial straw boss or leader, employees with modest authority but considerable skill, who are routinely excluded from the definition of supervisor"); *Meharry Medical College*, 219 NLRB 488, 490 (1975)(finding charge nurses' direction routine and that they "function more in the nature of lead persons").

[16] Employing this long-standing and generally applicable analysis, the Board has not simply held that nurses, by virtue of being nurses, are not supervisors. Rather, in many cases, the Board has held that nurses are supervisors under its test. *See, e.g., Extendicare Health Facilities, Inc.*, 330 NLRB No. 193 (2000); *Westwood Health Care Center*, 330 NLRB No. 141 (2000); *Beverly Enterprises-Massachusetts, Inc.*, 329 NLRB No. 28 (1999); *Health Care & Retirement Corp.*, 328 NLRB No. 156 (1999); *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997); *Bayou Manor Health Center*, 311 NLRB 955, 955 (1993); *Pine Manor Nursing Center*, 270 NLRB 1008, 1008-09 (1984); *Newton-Wellesley Hospital*, 219 NLRB 699, 699-702 (1975)(supervisors, nurse leaders, and assistant supervisors are supervisors, head nurses are not); *Wing Memorial Hospital Ass'n*, 217 NLRB 1015, 1016-17 (1975)(shift supervisors are supervisors, but head nurses are not); *North Dade Medical Complex*, 210 NLRB 588, 592 (1974); *Avon Convalescent Center, Inc.*, 200 NLRB 702, 705-06 (1972), *enf'd*, 490 F.2d 1384 (6th Cir. 1974). *Sherewood Enterprises, Inc.*, 175 NLRB 354, 354-55 (1969); *University Nursing Home*, 168 NLRB at 265.

Board has decided this case on the same grounds on which it has decided a myriad of other cases from other industries. The position of a nurse in a residential facility like this one is no different than that of a skilled carpenter building a house under § 2(11). They both coordinate the work of less skilled employees and occasionally direct their work. Neither is a supervisor under the Board's jurisprudence. Rejection of the Board's position in this case will have profound ramifications for national labor policy and drastically contract the coverage of the Act. The Board's holding that the limited form of assignment and direction engaged in by the RNs in this case does not require the use of independent judgment is reasonable and consistent with the Act and thus must be sustained.

III. THE BOARD CORRECTLY APPLIED ITS REASONABLE CONSTRUCTION OF THE ACT TO THE FACTS OF THIS CASE.

A. The Board Reasonably Placed the Burden of Proof On the Party Asserting the Exemption.

In *HCR*, this Court set out the basic framework for determining whether an employee is a supervisor as follows:

> [T]he statute requires the resolution of three questions; and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in 1 of the 12 listed activities? Second, does the exercise of that authority require "the use of independent judgment"? Third, does the employee hold the authority "in the interest of the employer"? [511 U.S. at 573-574.]

In other words, it must first be established by record evidence that an individual is an "employee" of the employer, and then, before that "employee" will "be deemed a supervisor," it must be established by record evidence that each of the three questions identified in *HCR* are to be "answered in the affirmative."

The NLRB treats an employer claim "that certain of its [employees] who voted in [a representation] election are statutory supervisors under [*HCR*], and should be excluded from the unit" as an "affirmative defense[]." *HeartShare Human Services of New York, Inc.*, 317 NLRB 611 (1995). And, in the instant case, the Board concluded that "the Employer has not met its burden of establishing that the RNs, even when serving as 'building supervisors,' are supervisors within the meaning of Section 2(11) of the Act," PA 53a, in that the employer did not produce evidence supporting affirmative answers to the first two of the questions identified in *HCR*.

In reversing the Board, the Sixth Circuit ruled that the "NLRB has the burden of proving that employees are not supervisors." PA 15a (court's brackets omitted), quoting *Grancare, Inc. v. NLRB*, 137 F.3d 372, 375 (6th Cir. 1998). *But see id.* at 378-379 (Moore, J., dissenting). As Judge Jones of the Sixth Circuit—who filed a dissent below—has observed, the Sixth Circuit is "the only circuit that requires the Board to prove that employees are not supervisors." *Integrated Health Services v. NLRB*, 191 F.3d 703, 713 (6th Cir. 1999) (Jones, J., dissenting).[17] In this regard, the allocation of this burden approved by all of the circuits—other than the Sixth—is eminently sound.

In *New York University Medical Center*, Judge Jacobs of the Second Circuit explained the unimpeachable legal grounds for requiring the employer to bear this burden:

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[17] *See New York University Medical Center v. NLRB*, 156 F.3d 405, 412-13 (2d Cir. 1998); *NLRB v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1313 (7th Cir. 1998); *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 703 (8th Cir. 1992); *Northern Montana Health Care Center v. NLRB*, 178 F.3d 1089, 1094 (9th Cir. 1999); *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1263 (11th Cir. 1999); *Beverly Enterprises--Massachusetts, Inc. v. NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999).

> It is evident . . . that supervisory status is a statutory exception, separately stated, to the provisions of the Act that extend its coverage to all employees. The applicable rule of statutory construction is that the party claiming the benefit of such an exception must demonstrate its applicability. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948). In other words, the [contested individuals] *are* employees, and they may or may not *also* be supervisors, which would take them outside the ambit of the Act. The NLRB bears . . . the burden of demonstrating that the [contested individuals] are employees of [the employer]; the burden of establishing that they are supervisors is on the [employer]. [156 F.3d at 413 (emphasis in original).][18]

This approach, we would emphasize, is consistent with that followed under the Fair Labor Standards Act, where "the general rule [is] that the application of an exemption . . . is a matter of affirmative defense on which the employer has the burden of proof." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). *See also Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994) (the NLRB's approach of "plac[ing] the burden of persuasion on the employer as to its affirmative defense" is "consistent with § 7(c)" of the Administrative Procedure Act).

The Board's approach here—and the general approach it exemplifies—is not a mere matter of form but one grounded in the logic of the situation. As Judge Moore of the Sixth Circuit

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[18] The fact that *New York University Medical Center* was a §8(a)(3) case involving alleged employer retaliation for union activity and the instant case arises under §8(a)(5) makes no analytical difference. The only practical difference between the two types of cases is that in the latter—where the employer is challenging the certification issued by the Board in an earlier representation case—the Board will not allow the employer to relitigate the supervisory issue unless "it allege[s] . . . special circumstances that would require the Board to reexamine the decision made in the representation proceeding." *Heart Share Human Services*, 317 NLRB at 611. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

has explained, "placing the burden of proof upon the Board requires proof of a negative—proof that an employee does not exercise *any* of the twelve statutory indicia of supervisory status when using independent judgment," whereas "placing the burden of proof on the employer, the party with superior access to the relevant proof, would narrow the inquiry from all twelve enumerated activities to the specific supervisory activities in which the nurses allegedly participate." *Grancare*, 137 F.3d at 379 (dissenting opinion; emphasis in original).

B. The Board's Factual Findings Are Supported by Substantial Evidence.

1. *The Board Correctly Found that the RNs' Direction And Assignment Does Not Require Independent Judgment.*

a. The Assignment is Routine

The Board correctly found that the RN/Building Supervisors' function to insure that the established staff-to-resident ratio is maintained does not require the exercise of independent judgment but is routine. This factual finding is supported by the following substantial evidence.

First, the RNs play no role in assigning staff to shifts or positions on a permanent basis. JA 18-19. The Board observed in *Providence* that this was "the type of assignment most closely identified with essential managerial functions requiring the use of independent judgment." 320 NLRB at 731.

Second, the RNs play no role in setting the staff-to-resident ratio. JA 23-24.

Third, the judgment that additional staff is needed is a matter of counting heads and comparing the outcome to the preestablished ratio. The Administrator testified, "Well they would determine from—I mean the numbers are already there. So they, by counting the number of bodies in the building they can determine whether or not it's [necessary to obtain additional

staff]." JA 23.[19] The RNs cannot seek additional staff for any other reason without the approval of the conceded supervisor on call. JA 24.

Fourth, the RNs do not have authority to require employees to stay for another shift or to come in from off-duty. JA 38.

Fifth, the need to secure additional staff from off the premises rarely arises. For example, it did not happen in the entire month prior to the hearing in this case. JA 43.

"Finally, a conceded supervisor is always on call if any non-routine question concerning staffing arises.

Thus, substantial evidence supports the Board's finding, guided by the "principles" set forth in *Providence*, that the limited assignment did not require independent judgment. First, the decision to seek additional personnel was made on a "rational" or prescribed basis—the prescribed staff-to-resident ratio—like a decision to "equalize employees' work on a rotational . . . basis." 320 NLRB at 727. Second, the decision was made only to "meet the vagaries of manpower needs." Id. In other words, the RNs did not make permanent assignments, but only filled in gaps in those assignments on occasion. Finally, the RNs merely "ask[]ed, without authority to require," employees to work an extra shift. *Id.* Such a request does not constitute the exercise of independent judgment because it has to be concurred in either by the employee or by a conceded supervisor if no volunteer can be found.[20]

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[19] Building Supervisors can transfer an employee from one unit to another only for the same reason and under similar circumstances – "[t]o make sure the head count is there." JA 28-29.

[20] The Board has reached the same conclusion in many cases arising inside and outside the health care industry. *See, e.g., Evangeline of Natichtoches, Inc.*, 323 NLRB 223, 224 (1997); *Quadrex Environmental Co.*, 308 NLRB 101, 107 (1992).

- b. The Direction is Routine.

The Board's finding that, while the RNs might exercise independent judgment in carrying out their professional duties, they do not exercise such judgment in delegating discrete tasks to others is supported by the following substantial evidence.

First, the only examples of this form of delegation in the record involve discrete and simple tasks performed to assist the RNs in the performance of their own professional duties. The RN directs the LPN to dispense particular medications to particular residents. The RN asks a Rehabilitation Assistant for help in treating a patient who is acting out. In fact, the Administrator explained that these simple tasks are delegated in order to save the RNs' time. "The idea of having the LPN's was to have them primarily pass the medications, because that—it is time consuming, and not a good use of the RNs time." JA 29.

Second, there is no evidence in the record that the RNs choose from among a group of employees when delegating tasks. There is only one LPN on duty to dispense medications for the RN. JA 16 (only two nurses on duty each shift, one RN and one LPN). Similarly, the Rehabilitation Assistant who assists an RN in treating a resident who is acting out or who assists the patient to get up to take medication is the Rehabilitation Assistant assigned to the unit containing the resident.

Finally, such direction is a minor and ancillary element of the RNs' own professional duties of caring for residents.[21]

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[21] The Board has reached the same conclusion in many cases arising inside and outside the health care industry. *See, e.g., Vencor Hospital-Los Angeles*, 328 NLRB No. 167 at 4 (1999); *Arlington Elec., Inc.*, 332 NLRB No. 74 at 1-2 (2000). The Sixth Circuit, outside the nurse context, has also recognize the distinction between performing complex tasks that require independent judgment and delegating discrete elements of those tasks to other less-skilled employees. *See Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 921 (6th Cir. 1991).

2. *The Board Correctly Found that the RNs Do Not Have Any of The Other Duties Listed in Section 2(11).*

The Sixth Circuit found that the RN/Building Supervisors have authority to "write up" other employees and to send an employee home, and serve as the highest ranking employees physically present in the facility. PA 16a-17a. But the Board's finding that the RNs do not have any of the duties listed in §2(11) other than assignment and direction is supported by substantial evidence.

a. Authority to "Write-up" Employees Is Not Authority to Discipline.

The Regional Director found that the RNs "do not have the authority to . . . discipline employees or to effectively recommend such action." PA 52a. This finding is supported by substantial evidence.

"The RNs' authority to "write-up" other employees is not the authority to discipline or even to effectively recommend discipline but merely a duty to report. The Regional Director found that RNs may complete incident reports, but "so can any other employee." PA 51a. Such reporting is done by anyone in the facility who observes a problem with another employee's work. JA 14-15, 31. The reports, including those made by the RNs, do not include any recommendation for discipline or other action. These incident reports are given to the Administrator and the Unit Coordinators. JA 14. The decisionmaker concerning whether the facts reported merit discipline is the Unit Coordinator. JA 31. Incident reports completed by RNs carry no special weight. Rather, "[a]ll incident reports are independently investigated by the Nursing or Unit Coordinators to determine if any disciplinary action is warranted and it does not appear that these management officials seek any input from the RNs involved." PA 51a. The only evidence in the record concerning a complaint by an RN concerning another employee

is that an RN complained about an LPN who was abusive and did not follow her directions and no action was taken. PA 51a-52a. Even when acting as Building Supervisor, RNs have no authority to discipline or even threaten discipline of an employee who refuses to work an extra shift. JA 38.[22]

b. RNs Do Not Have Authority to Send an Employee Home.

Although it did not rely on the observation in reaching its legal conclusion, the Court of Appeals observed that an RN/Building Supervisor "could send an employee home." PA 17a. However, substantial evidence supports the Board's finding that "the only extra responsibility assumed by the RNs when serving as 'building supervisors' is to obtain needed help if for some reason a shift is not fully staffed." PA 51a.

First, no RN has ever sent an employee home. JA 26, 38, 55-56. Only in response to a hypothetical question did the Administrator speculate that an RN might "ask" an employee to leave the building. JA 20.

Second, there is no evidence that RNs were every told they had this authority. Not one of the three memoranda describing the Building Supervisor's duties mentions this authority. Inside and outside the healthcare industry, the Board has long held that granting authority on paper (which was not even done in this case) but not in practice does not make an employee a supervisor. *See, e.g., Beverly Enterprises-Mass., Inc. v. NLRB*,

[22] Inside and outside the healthcare industry, Courts of Appeals have uniformly agreed with the conclusion that reporting facts is not the same as imposing or effectively recommending discipline. *See, e.g., Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 266 (2d Cir. 2000); *NLRB v. Meenan Oil Co. v. NLRB*, 139 F.3d 311, 322 (2d Cir. 1998); *Telemundo*, 113 F.3d at 275. Outside the nurse cases, the Sixth Circuit has agreed that "the mere reporting of facts is not enough to make the reporter a supervisor." *Highland*, 927 F.2d at 922.

165 F.3d 960, 962-63 (D.C.Cir. 1999); *NLRB v. Security Guard Service*, 384 F.2d 143, 149 (5th Cir. 1967).[23]

c. Being the Highest Ranking Employee Physically Present Does Not Make an Employee a Supervisor.

Being the highest ranking employees physically present in the facility is not among the duties listed in § 2(11). Supervision and status are two different things. A supervisor is not a high ranking official or even the highest ranking official, but an employee who performs the duties specified in § 2(11).

At most, being the highest ranking employee on duty is circumstantial evidence that the employee performs relevant duties. It is weak circumstantial evidence here because of the facts that a conceded supervisor is always on call and that RNs serve as Building Supervisors only on the second and third shifts and on weekends when residents are asleep for a large portion of the time or there is less resident and staff activity. As the Board observed in another case, "Little happens at night in a care center setting." *Beverly Manor*, 275 NLRB at 947. Under these circumstances, exercise of the § 2(11) functions can be

[23] Moreover, even if RNs actually have such authority, it would only be in the event of egregious misconduct constituting an obvious violation of the rules such as an employee becoming "insubordinate or unruly" or "intoxicated." JA 20. Inside and outside the healthcare industry, the Board has repeatedly held that such "offenses are obvious violations of the employers' policies and speak for themselves" so that sending an employee home for such conduct does not require independent judgment. *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993). *See, e.g., Washington Nursing Home*, 321 NLRB 366, 366 n. 4, 371-72 (1996); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).

Finally, such authority would be exercised to protect the facility not to discipline employees. The decision on discipline would be made later by a conceded supervisor. The RNs would be "required to report that immediately to probably that person's supervisor" and what disciplinary action should be taken would be a question of "normal personnel action"—*i.e.*, it would not be determined by the Building Supervisor. JA 20, 25.

deferred to the next business day or handled by the supervisor on call. "In today's modern world of beepers, cordless phones, and fax machines, a supervisor need not be physically present to exercise supervision over the workplace." *Grancare*, 137 F.3d at 383 (Moore, J., dissenting).[24]

The Court of Appeals cites the language in the undated memorandum concerning Building Supervisors (that the RN who testified had never seen) that the Building Supervisor is "in charge of the facility and all rehabilitation staff." PA 16a. However, not only did the RN testify that she was not in charge of any rehabilitation staff, such vague, paper pronouncements are not evidence of supervisory status. They do not vest any specific authority described in § 2(11).[25]

The Board's finding that being the highest ranking employee physically present in the facility did not give the RNs any of the authority required by § 2(11) is supported by substantial evidence. Thus, the Board's finding that the RNs do not perform any of the functions listed in § 2(11) other than assignment and direction, like the Board's finding that the RNs do not exercise independent judgment in their limited assignment and direction is supported by substantial evidence.

CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals should be reversed.

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[24] In cases involving both nurses and other types of employees, the Board has often concluded that being the highest ranking employee in the workplace does not render an employee a supervisor. *See, e.g., Loyalhanna Care Center*, 322 NLRB No. 86 at 4 (2000); *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1279 (5th Cir. 1986).

[25] Thus, inside and outside the healthcare industry, the Board has consistently held that merely designating an employees as "in charge" does not make them a supervisor. *See, e.g., Crittenton Hospital*, 328 NLRB No. 120 (1999); *Golden West*, 215 NLRB at 762 n. 4.

Respectfully submitted,

JONATHAN P. HIATT
JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

THOMAS J. SCHULZ *
632 Comanche Trail
Frankfort, KY 40601
(502) 875-7474

CRAIG BECKER
25 East Washington Street
Chicago, IL 60602

* *Counsel of Record*